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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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E-filing

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JCS

MELONEY WRIGHT and DONNY
WRIGHT, wife and husband; DANYELE
BACON, a single woman; DIANA BURK,
a single woman; TIMA LEIPHART, a
single woman; NUBIA FLORES, a single
woman; MOLLY KIRKPATRICK, a single
woman; REYNALDA ALVARADO, a
single woman; GAYLE ANDERSON, a
single woman; VERONIQUE PETERS and
DONNY PETERS, wife and husband;
LAKEYA BASKOM, a single woman;
TIFFANY LILLIE, a single woman; and
LORRAINE FONTANILLA-WEBBER, on
behalf of her minor daughter, ASHLEY
WEBBER,

Plaintiffs,

v.

ORTHO-MCNEIL CORPORATION, a
foreign corporation; JOHNSON &
JOHNSON, a foreign corporation;
JOHNSON & JOHNSON SERVICES,
INC., a foreign corporation; JOHNSON &
JOHNSON HEALTH CARE SYSTEMS,
INC., a foreign corporation; JOHNSON &
JOHNSON RESEARCH &
DEVELOPMENT, L.L.C., a foreign
corporation; JOHNSON & JOHNSON
CONSUMER COMPANIES INC., a
foreign corporation; MCKESSON
CORPORATION, a Delaware corporation;
ALZA CORPORATION, a California
corporation aka ALZA DEVELOPMENT

Case 07-2541
NOTICE OF REMOVAL AND
REMOVAL OF ACTION UNDER 28
U.S.C. § 1441(b) [DIVERSITY]

1 aka ALZA INTERNATIONAL, INC., and
2 DOES 1-50,

3 Defendants.

4 **TO THE CLERK OF THE COURT:**

5 Defendants Ortho-McNeil Pharmaceutical, Inc. (erroneously sued herein as
6 "Ortho-McNeil Corporation") ("OMP"), Johnson & Johnson ("J&J"), Johnson &
7 Johnson Services, Inc. ("JJSI"), Johnson & Johnson Health Care Systems, Inc.
8 ("JJHCS"), Johnson & Johnson Pharmaceutical Research & Development, L.L.C.
9 ("JJPR&D"), and Johnson & Johnson Consumer Companies, Inc. ("JJCC") (collectively,
10 "defendants") remove to this Court the state court action described below, based on
11 diversity of citizenship, pursuant to 28 U.S.C. §1332. As detailed here, the Court should
12 disregard the citizenship of defendants Alza Corporation (erroneously sued herein as
13 "Alza Corporation aka Alza Development aka Alza International, Inc.") ("Alza") and
14 McKesson Corporation ("McKesson") because plaintiffs fraudulently joined those
15 parties.

16 **BACKGROUND**

17 1. On February 14, 2007, the Phoenix, Arizona law firm of Phillips &
18 Associates filed a personal injury action in the Superior Court of California, County of
19 San Francisco, entitled *Meloney Wright, et al. v. Ortho-McNeil Corporation, et al.*, Case
20 Number CGC-07-460481, sounding in failure to warn and fraudulent concealment. A
21 copy of the Complaint in that state court action (the "Complaint") is attached as Exhibit
22 A to the accompanying Declaration of Brenda N. Buonaiuto ("Buonaiuto Dec.").

23 None of the fourteen plaintiffs, only three of whom even reside in California,
24 allege to have any connection to San Francisco County. (Complaint ¶¶ 1-12.) The
25 majority of the plaintiffs, who are residents of Arizona or Iowa, have no alleged
26 connection to the State of California at all. (*Id.*) Plaintiffs' claims have nothing in
27 common, other than that they all allege to have used Ortho Evra®. (*See* Complaint.)
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Plaintiffs allege causes of action for Negligence, Strict Liability [Design Defect and Failure to Warn], Breach of Express Warranty, Breach of Implied Warranty, Fraudulent Misrepresentation, Fraudulent Concealment, Medical Monitoring and Proper Labeling, Violation of Business & Profession Code Sections 17200 and 17500, and Loss of Consortium. Although devoid of any factual allegations against them, plaintiffs' Complaint includes as defendants Alza, a Delaware corporation, with its principal place of business in Mountain View, California, and McKesson, a Delaware corporation, with its principal place of business in San Francisco, California. (Buonaiuto Dec. ¶ 7; Declaration of Greg Yonko, filed in *Abel, Theresa, et al. v. Ortho-McNeil Pharmaceutical, Inc., et al.*, USDC ND CA Case No. C 06 7551 SBA ("Yonko Dec."), attached to the Buonaiuto Dec. as Exhibit B, ¶ 2.) Alza is a subsidiary of J&J, whose role was limited to serving as the manufacturing site (from 2002 to 2006) of Ortho Evra® patches for OMP, another separate and distinct J&J subsidiary. (Affidavit of Alejandro Hojas ("Hojas Aff.") ¶ 3; Buonaiuto Dec. ¶¶ 4, 7.) McKesson is a non-exclusive distributor of the patches. (Buonaiuto Dec. ¶ 8.) Neither company is or was responsible for the labeling or prescribing information for Ortho Evra. (Hojas Aff. ¶ 6; Yonko Dec. ¶¶ 5, 7.) Neither company was involved in post-marketing surveillance of the product. (Hojas Aff. ¶ 5; *see generally* Yonko Dec.)

BASIS FOR JURISDICTION

2. Basis for Jurisdiction in this Court. This Court has original jurisdiction over this action, and defendants may properly remove to this Court, because the amount in controversy exceeds \$75,000, exclusive of interest and costs, and there is diversity of citizenship of all named parties not fraudulently joined. 28 U.S.C. §§ 1332, 1441(a).

a. Amount in Controversy. Pursuant to California Code of Civil Procedure Section 425.10(b), the amount of damages sought by plaintiffs is not stated in the Complaint. However, plaintiffs allege that they have been "permanently and severely injured, having suffered serious consequences from the use of Ortho Evra [and] require

1 and will require ongoing medical care and treatment.” (Complaint ¶ 49.) They allege
2 “diminished capacity for the enjoyment of life, a diminished quality of life, increased risk
3 of premature death, aggravation of preexisting conditions and activation of latent
4 conditions, and other losses and damages.” (*Id.* ¶ 62.) Plaintiffs claim “medical losses
5 and costs includ[ing] care for hospitalization, physician care, monitoring, treatment,
6 medications, and supplies,” “mental and physical pain and suffering,” and “loss of wages
7 and wage-earning capacity.” (*Id.*)

8 Plaintiffs further claim “mental anguish” and “emotional distress.” (Complaint ¶
9 50, 52.) Plaintiffs allege that Donny Wright and Donny Peters have suffered loss of
10 “consortium, society, comfort, protection, and service, thereby causing and continuing to
11 cause grief, sorrow, mental anguish, emotional distress and pain and suffering.” (*Id.* ¶
12 135.) Plaintiffs further allege that defendants have engaged in conduct giving rise to
13 punitive damages. (*See e.g.* Complaint ¶¶ 63, 75, 82, 92, 101, 109, and 127.)

14 Given the nature of plaintiffs’ claims, and a review of damages awards and
15 settlement amounts in this judicial district, in cases involving allegations of serious
16 injuries from the use of prescription drugs or medical devices, it is reasonably believed
17 that, if plaintiffs succeeded in proving the allegations of the Complaint, they would each
18 recover a minimum of \$75,000 in damages. (Buonaiuto Dec. ¶ 15.) Indeed, plaintiffs
19 claiming substantially similar injuries in the Ortho Evra® MDL have specifically alleged
20 that the amount in controversy in their respective actions exceeds \$75,000, exclusive of
21 interest and costs. (*Id.*)

22 It is therefore “facially apparent” from the nature of the claims alleged and the
23 types of damages sought that the amount in controversy as to each plaintiff in this action
24 exceeds \$75,000, exclusive of interest and costs. *See White v. FCI USA, Inc.*, 319 F.3d
25 672, 674 (5th Cir. 2003) (it was “facially apparent” that claim exceeded \$75,000 based on
26 plaintiff’s “lengthy list of compensatory and punitive damages”); *see also In re Rezulin*
27 *Products Liability Litigation*, 133 F.Supp.2d 272, 296 (S.D.N.Y. 2001) (concluding that
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1 complaint “obviously asserts a claim exceeding \$75,000” where plaintiff seeks
2 “compensatory and punitive damages” for alleged “serious and life-threatening medical
3 conditions” due to use of prescription medicine); *International Padi, Inc. v. Diverlink*,
4 2005 WL 1635347 at *1 (9th Cir. Cal. 2005) (court considered plaintiffs’ general
5 allegations of unspecified general and special damages “reasonably believed to be in
6 excess of the jurisdictional limits” of the trial court and their request for injunctive relief
7 to “easily conclude” that the \$75,000 amount in controversy requirement was met).

8 b. Citizenship of the Parties. There is complete diversity of citizenship
9 between the parties not fraudulently joined. As alleged in the Complaint, plaintiffs are
10 citizens variously of Arizona, California, and Iowa. (Complaint ¶¶ 1-12.) At the time the
11 state court action was filed and at the time of this removal, OMP was and is a corporation
12 existing under the laws of the State of Delaware, with its principal place of business in
13 New Jersey. (Buonaiuto Dec. ¶ 4.) J&J, JJSI, JJHCS, and JJCC were and are all New
14 Jersey corporations, with their principal places of business in New Jersey. (*Id.* ¶ 5.)
15 JJPR&D was and is a New Jersey limited liability company, with its principal place of
16 business in New Jersey. (*Id.* ¶ 6.) Therefore, diversity of citizenship exists between
17 plaintiffs and those defendants not fraudulently joined, pursuant to 28 U.S.C. Section
18 1332.

19 c. Plaintiffs Fraudulently Joined Alza and McKesson. The only other
20 named defendants in this action, Alza and McKesson, were and are Delaware
21 corporations, with their principal places of business in Mountain View, California, and
22 San Francisco, California, respectively. (Buonaiuto Dec. ¶ 7; Yonko Dec. ¶ 2.) Neither
23 Alza nor McKesson has any potential liability to plaintiffs or to any of them. Rather,
24 plaintiffs named Alza and McKesson as “sham” defendants in an effort to destroy
25 diversity and to prevent this case from being removed to federal court and then
26 transferred to the Ortho Evra® MDL, which is pending in the Northern District of Ohio.
27 (Buonaiuto Dec. ¶ 10.)
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1 A defendant is fraudulently joined if “the plaintiff fails to state a cause of action
 2 against the defendant, and the failure is obvious according to the settled rules of the
 3 state.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (where non-
 4 diverse defendant is fraudulently joined, there is an exception to the requirement of
 5 complete diversity); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998)
 6 (“fraudulently joined defendants will not defeat removal on diversity grounds”). “When
 7 determining whether a defendant is fraudulently joined, “[t]he court may pierce the
 8 pleadings, consider the entire record, and determine the basis of joinder by any means
 9 available.” *Maffei v. Allstate California Ins. Co.*, 412 F.Supp.2d 1049 (E.D.Cal. 2006),
 10 citing *Lewis v. Time, Inc.*, 83 F.R.D. 455 (E.D.Cal. 1979) (“it is well settled that upon
 11 allegations of fraudulent joinder ... federal courts may look beyond the pleadings to
 12 determine if the joinder ... is a sham or fraudulent device to prevent removal”). If
 13 revealed that the joinder is fraudulent, the Court may dismiss the sham defendant.
 14 *Maffei, supra*. Alza and McKesson are so fraudulently joined here.

15 Alza and McKesson are fraudulently joined because plaintiffs have not made any
 16 material allegations against them. *See e.g. Brown v. Allstate Insurance*, 17 F.Supp.2d
 17 1134, 1137 (S.D.Cal. 1998) (finding in-state defendants fraudulently joined where “no
 18 material allegations” against those defendants were made). Indeed, these defendants are
 19 only referred to by name once each in the Complaint, when plaintiffs set forth their
 20 jurisdictional allegations. (*See* Complaint ¶¶ 15-16.) Here, as demonstrated by the
 21 Complaint, plaintiffs’ claims are substantively directed against the manufacturer of Ortho
 22 Evra® – OMP, and not at Alza or McKesson. Indeed, none of plaintiffs’ factual
 23 allegations, on which all of their causes of action are based, involve Alza or McKesson.
 24 (*See* “Summary of the Case” and “Factual Background” at Complaint ¶¶ 28-58.)

25 Specifically, plaintiffs claim that defendants: concealed knowledge of
 26 unreasonably dangerous risks associated with the product; failed to conduct adequate and
 27 sufficient post-marketing surveillance of the product; failed to provide the FDA with
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complete and adequate information regarding the product; failed to warn consumers and/or their health care providers of certain risks associated with the product; and made affirmative misrepresentations and omissions regarding the risks associated with taking Ortho Evra®.¹ (See Complaint.) All of these claims are substantively based on failure to warn, fraudulent concealment, and inadequate post-marketing surveillance – allegations that go to the alleged acts and omissions of the company responsible for Ortho Evra® -- OMP -- and not to the conduct of Alza, which simply served as the manufacturing site of the patches (during the limited time period 2002-2006), or of McKesson, a non-exclusive distributor of the product.

Indeed, there are zero factual allegations to support a claim against Alza or McKesson.² The absence of such allegations compels the conclusion that plaintiffs fraudulently joined these defendants. See e.g. *Lyons v. American Tobacco Co.*, 1997 WL 809677 at *5 (S.D.Ala. 1997) (holding that there is “no better admission of fraudulent joinder” than the failure of plaintiff “to set forth any specific factual allegations” against the joined defendant); see also *Charlin v. Allstate Ins. Co.*, 19 F.Supp.2d 1137, 1140 (CD Cal. 1998) (“a joinder is fraudulent if there is no intention to get a joint judgment, and there is no colorable ground for so claiming.”) Plaintiffs cannot cure this deficiency by relying on allegations directed toward “Defendants” generally or toward OMP. See *In re PPA Products Liability Litigation*, MDL No. 1407, Docket No. C02-423R (W.D.Wash. Nov. 27, 2002), Slip Op. at 5 (attached as Exhibit C to Buonaiuto Dec.) (allegations directed toward “defendants” or “all defendants” insufficient); *Harris v. Business Transportation and Housing Agency, et al.*, 2007 1140667 at *6 (N.D.Cal. 2007) (finding that a plaintiff “must plead facts showing the connection between the

¹ As detailed in their Answer, filed simultaneously with this Removal, defendants deny plaintiffs’ allegations and deny that they are liable to plaintiffs in any manner or sum whatsoever.

² Notably, as to McKesson, a non-exclusive distributor of Ortho Evra®, there are not even any allegations that it distributed or sold Ortho Evra® to plaintiffs or to any of their respective health care providers or pharmacists. (See Complaint.)

1 actions he attributes to each defendant and the claim or claims he asserts against that
2 defendant.”)

3 Further, even if plaintiffs had included McKesson in their allegations, under
4 California law, McKesson bears no duty to warn plaintiffs. Rather, the “learned
5 intermediary doctrine” provides that the duty to warn of a drug’s risk runs from the
6 manufacturer to the physician, and then from the physician to the patient. *See Brown v.*
7 *Superio Court (Abbott Labs.)*, 44 Cal.3d 1049, 1061-62, n.9 (1988); *Carlin v. Superior*
8 *Court (Upjohn Co.)*, 13 Cal.4th 1104, 1116 (1996). The rationale of the learned
9 intermediary doctrine is that the physician is in the best position to determine whether a
10 patient should use a prescription drug, and imposing a duty to warn on others would
11 threaten to undermine reliance on the physician’s informed judgment. For this reason,
12 California courts have rejected imposing liability on distributors, including specifically
13 McKesson, for failure to warn of the risks of using a prescription drug. *See e.g. Barlow*
14 *v. Warner-Lambert Co.*, Case No. CV-03-1647-R(RZx), Slip Op. at 2 (C.D.Cal. April 28,
15 2003) (attached as Exhibit D to the Buonaiuto Dec.) (“the Court finds that there is no
16 possibility that plaintiffs could prove a cause of action against McKesson, an entity which
17 distributed [the prescription medication at issue] to pharmacists in California;” motion to
18 remand denied); and *Skinner v. Warner-Lambert Co.*, Case No. CV-03-1643-R(RZx),
19 Slip Op. at 2 (C.D.Cal. April 28, 2003) (attached as Exhibit E to Buonaiuto Dec.) (same).

20 Given their complete failure to tie Alza or McKesson to any of the allegations in
21 their Complaint, it is clear that plaintiffs named those entities as “sham” defendants, to
22 prevent defendants from removing the action to federal court and then transferring it to
23 the Ortho Evra® MDL. Courts have consistently ruled that such collusive tactics are not
24 to be recognized. *See e.g. Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d
25 593 (9th Cir. 1996) (noting there is no more reason for federal courts to countenance
26 destruction of jurisdiction by the use of straw parties than there is for them to
27 countenance the creation of jurisdiction in that manner); *Grassi v. Ciba-Geigy, Ltd.*, 894

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1 F.2d 181, 185 (5th Cir. 1990), *citing* American Law Institute, Study of the Division of
 2 Jurisdiction Between State and Federal Courts, Official Draft, at 169 (1969) ("Removal
 3 based on diversity of citizenship is a right conferred by Congress, the need for which
 4 'may well be greatest when the plaintiff tries hardest to defeat it.'").

5 d. Citizenship of Doe Defendants. Pursuant to 28 U.S.C. Section
 6 1441(a), for purposes of removal, the citizenship of defendants Does 1-50 must be
 7 disregarded because plaintiffs sued those defendants under fictitious names.

8 REMOVAL TIMELY FILED

9 3. Service was made on the respective registered agents for service of process
 10 for all defendants on April 12, 2007. (Buonaiuto Dec. ¶ 3.) Therefore, this Removal was
 11 timely filed within 30 days of service, pursuant to 28 U.S.C. § 1446(b).

12 CONSENT TO REMOVAL

13 4. Alza and McKesson, which were fraudulently joined, consent to
 14 defendants' removal of this action to this Court. (Buonaiuto Dec. ¶¶ 7-8.)

15 STATE COURT WITHIN THE COURT'S JURISDICTION

16 5. The San Francisco County, California Superior Court, from which
 17 defendants remove this action, is within this Court's jurisdiction.

18 STATE COURT PLEADINGS

19 6. Copies of the state court pleadings known to all defendants to have been
 20 filed in this action are collectively attached to the Buonaiuto Dec. as Exhibit A.

21 FILING AND SERVICE OF NOTICE OF REMOVAL AND REMOVAL

22 7. Defendants will file a notice of the filing of this Notice of Removal and
 23 Removal in the San Francisco County Superior Court and will serve plaintiffs' counsel
 24 with a copy. (Buonaiuto Dec. ¶ 9.)

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1 WHEREFORE, defendants hereby remove to this Court San Francisco County
2 Superior Court Case No. CGC-07-460481.

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4 Dated: May 14, 2007

DRINKER BIDDLE & REATH

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6 BRENDAN N. BUONAIUTO

7 Attorneys for Defendants
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